No. 87-19

Supreme Court, U.S.
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In The Supreme Court Of The United States

October Term, 1987

ROY F. WATTS,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an individual is entitled to retirement credit for purposes of the Civil Service Retirement Act (5 U.S.C. 8331 et seq.) for employment with a government owned or controlled covert intelligence proprietary corporation.

2. Whether an individual is entitled to retirement credit for purposes of the Civil Service Retirement Act (5 U.S.C. 8331 et seq.) for government employment pursuant to a personal service contract.

3. Whether the Appeals Court below erred by finding that a decision favorable to Petitioner would adversely affect the Civil Service Retirement System when the administrative record below contained no evidence to support such a finding.

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5 USC 2251 (pre 1966 codification)

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50 USC 403j

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PETITION FOR A WRIT OF CERTIORARI
TO SUPREME COURT

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Roy F. Watts, the Petitioner herein, prays that a writ of certiorari issue to review a judgment of the United

States Court of Appeals for the Federal Circuit entered in the above-entitled case on April 1, 1987.

As the appeals court below noted, this case raises "extraordinary implications for the civil service" system. Further, it is a case of first impression since the Court has never ruled upon the applicability of the civil service retirement laws to employees of covert government proprietary corporations.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit, dated April 1, 1987, is reported at ___ F.2d ___ and is printed in Appendix A hereto. The opinion of the Merit Systems Protection Board,

dated January 4, 1985 is unreported and is printed in Appendix B hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit was entered on April 1, 1987. The jurisdiction of the Supreme Court is invoked under 28 USC 1254(1). Jurisdiction of the Federal Circuit below was based upon 5 U.S.C. 7703 (b)(1).

QUESTIONS PRESENTED

1. Whether an individual is entitled to retirement credit for purposes of the Civil Service Retirement Act (5 U.S.C. 8331 et seq.) for employment with a government owned or controlled covert intelligence proprietary corporation.

2. Whether an individual is entitled to retirement credit for purposes of the Civil Service Retirement Act (5 U.S.C. 8331 et seq.) for government employment pursuant to a personal service contract.

3. Whether the Appeals Court below erred by finding that a decision favorable to Petitioner would adversely affect the Civil Service Retirement System when the administrative record below contained no evidence to support such a finding.

STATUTES INVOLVED

This case involves an interpretation of 5 U.S.C. 2105(a) which, in pertinent part, provides:

> (a) For the purpose of this title [5 USCS 101, et seq.], "employee," except as otherwise provided by this section or when specifically

modified, means an officer and individual who is--

(1) appointed in the civil service by one of the following acting in an official capacity--
(A) the President;
(B) a Member or Members of Congress, or the Congress; (C) a member of a uniformed service;
(D) an individual who is an employee under this section;
(E) the head of a Government controlled corporation; or
(F) an adjutant general designated by the Secretary concerned under section 709(c) of title 32 [32 USCS 709(c)];

(2) engaged in the performance of a Federal function under authority of law or an Executive act; and

(3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

as it applies to 5 U.S.C. 8331, et seq.

governing the provision of Civil Service retirement benefits.

STATEMENT OF THE CASE

This is an action brought by a former employee of three covert intelligence proprietaries owned and/or controlled by the Central Intelligence Agency.

Petitioner seeks credit for time served with these government corporations for purposes of determining his entitlement to retirement benefits under the Civil Service Retirement System because he either 1) was an employee of a government owned or controlled corporation and thus is entitled to said credit as a federal employee or, alternatively, 2) is entitled to such credit because he performed personal services under a contractual arrangement with

these proprietaries.

The Evidence

Petitioner initially began his employment career as a pilot for the United States Army in the China Theater from October 1943, through May, 1947. At this time, while still employed by the United States Army, Petitioner accepted an offer of employment from General Claire Chennault's newly formed airline, CNRRA Air Transport, in the Far East (later renamed Civil Air Transport).

As a pilot for CNRRA, which Petitioner later understood to be funded in large part by United States' intelligence services, Petitioner flew para-military missions into portions of Mainland China, which were at that time still controlled by the Chinese Nationalists. Petitioner was under the

control of a CIA agent, and continued to be supervised and controlled by various CIA agents until Mainland China fell to the Communist Chinese. These para-military flights resumed in January, 1950.

At about this time the CIA also observed that CAT was having severe financial and management difficulties, and decided to purchase the airline outright. New management was installed based out of Washington, D.C. and the essence of the role of the CIA changed from that of controller to that of owner.

According to Petitioner's own Employment Summary, provided to the CIA in 1974, the CIA's purchase of CAT resulted in other changes as well. For example, all non-American or non-

Nationalist Chinese flight crew members were terminated. Those retained American pilots, like Petitioner, were required to execute new employment applications and security documents as a further indication of a lack of continuity with the prior management.

Petitioner's missions were then expanded to include North and South Korea during the American war effort there, all under the direct supervision and control of various CIA agents.

Petitioner flew missions in aid of the French government in combat operation in Dien Bien Phu, Vietnam, finally assisting in the evacuation of French forces from Hanoi to Saigon. Petitioner was trained for these missions by the CIA through the United States Air Force and was under their

direct supervision and control throughout this period. All of these clandestine missions were conducted in support of their perceived American interests in the Far East.

In July, 1957, Petitioner suffered an attack of poliomyelitis attributable to exhaustion brought on by overtime required of him by his CIA supervisors. While the CIA made all the necessary arrangements for Petitioner's recuperation and convalescence in a Veteran's Administration Hospital in Denver, Colorado, but he was never reimbursed by them for the cost of his private rehabilitation treatment after discharge.

Petitioner returned to CAT in July, 1958. Due to his disability, he was reclassified and assigned to hold two positions for the airline overtly as a

flight crew training manager and covertly as training manager for Flight crews of other CIA proprietaries. On March 31, 1959, CAT's name was changed to Air America, Inc. In July, 1961, Petitioner resigned from Air America to enter school in the United States.

In October of 1962, Petitioner returned to work for the CIA at their request, this time as an employee of another intelligence proprietary, Intermountain Aviation in Marana, Arizona. Once again, Petitioner was given direct and immediate supervision by CIA agents. Petitioner's activities at Intermountain Aviation included tracking and managing covert aircraft purchases, transfers and sales between the CIA and its proprietaries. Petitioner traveled overseas to inspect,

overtly purchase, and then "desanitize" designated type aircraft to be used in covert flight operation.

In December of 1966, Petitioner resigned from Intermountain Aviation to work for Applied Technology, Inc.(ATI), yet another CIA proprietary under the supervision of the agent who hired him. Petitioner's duties of initiating a new covert aircraft repair center in Lincoln, Nebraska, ended in April, 1967.

During Petitioner's employment with the above proprietaries, he was never provided with a private retirement plan. At the same time, however, Petitioner only vaguely knew of the true nature of the relationship between his employer and the federal government.

Procedural History

Petitioner's tortured thirteen year odyssey to obtain retirement credit

began in January, 1974, when he sought a determination from the CIA as to whether he was entitled to such credit as a federal employee for the time he was employed by the proprietaries. His request was forwarded by the CIA to the Civil Service Commission (CSC) which subsequently denied Petitioner's application, but never issued an appealable decision.

In frustration, Petitioner sought a determination from the United States District Court for the District of Columbia. Watts v. United States of America, et al., Civil Action No. 76-0385 (D.D.C. February 1, 1979) as his eligibility for retirement credit Watts claimed in his suit that he had been unfairly denied federal employee status, that the CIA and Air America,

Inc. had breached their agreements with him concerning his employment, and that Air America and the United States Government had infringed on his constitutional rights. Petitioner's claims against Air America and the CIA were later dismissed for lack of subject matter jurisdiction and his claim against the United States and the CSC was remanded to the CSC with directions to conduct full administrative proceedings. The District Court concluded that Petitioner deserved a full and fair hearing because, in the District Court's opinion, the record was inadequate for the application of any standard of review.

On June 20, 1979, pursuant to Judge Bryant's ruling, Petitioner submitted a new application to the Office of Personnel Management (OPM), requesting

credit based upon his employment with the air proprietaries between April 12, 1947, and April 28, 1967. Additional information was submitted by Petitioner to OPM on August 22, 1979; December 12, 1979, and June 2, 1980.

Petitioner received an initial decision from OPM on September 17, 1980, which reiterated once again that Petitioner was not a federal employee while working for the CIA proprietaries and was, therefore, not entitled to federal employment credit. Appeal lay with the Merit Systems Protection Board (MSPB). It is clear from the administrative record that OPM took only those steps required to justify its previous denial, rather that provide a full and impartial reevaluation as Judge Bryant had ordered.

A Petition for Review was filed with the MSPB on December 12, 1980. On February 1, 1982, OPM moved for summary judgment and Petitioner responded on April 9, 1982. An Initial Decision denying Petitioner's claim was issued by an administrative law judge on March 10, 1983.

Petitioner appealed this initial denial to the full Merit System Protection Board on April 12, 1983, which was rejected on January 11, 1985.

A Petition for Review was filed with the United States Court of Appeals for the Federal Circuit on February 4, 1985, and was argued before a three judge panel consisting of Judges Davis, Nichols and Archer on March 2, 1987. The decision appealed from herein was issued on April 1, 1987.

ARGUMENT

I. PETITIONER WAS A FEDERAL EMPLOYEE BECAUSE OF HIS EMPLOYMENT WITH A GOVERNMENT OWNED CORPORATION.

The appeals court below concluded in its April 1, 1987 opinion, Appendix A, page 11, that Petitioner was not a federal employee by virtue of his service with a government owned or controlled corporation and is thus not entitled to civil service retirement benefits. This holding is in error and it raises a serious question of federal law which must be settled by the Supreme Court. Further, it brings into question the legitimacy of several previous decisions of the Federal Circuit, leading up to the instant case, which have taken an extremely formalistic approach to the issue of "appointment" which should not be sanctioned by this Court.

The decision below also gives federal agencies carte blanche to obtain the services of employees, in total disregard of the civil service laws and then, at a later date, deny any responsibility to provide to these employees benefits afforded to other government employees. The serious implications flowing from this practice can hardly be questioned.

A. CIA PROPRIETARIES ARE GOVERNMENT CORPORATIONS

The Central Intelligence Agency (CIA) has authority to purchase and control covert proprietaries. This authority is firmly grounded in the National Security Act of 1947 and the Central Intelligence Act of 1949. Specifically, 50 U.S.C. 403(j) provides that:

(b) The sums made available to the agency may be expended without regard to the provisions of law and regulations relating to the expenditure of Government funds; and for objects of a confidential, extraordinary or emergency nature, such expenditures to be accounted for solely on the certificate of the Director, and every such sufficient voucher for the amount therein certified. (Emphasis added)

This provision provides the CIA with justification to create or acquire covert proprietaries and has been specifically approved by Congress.

In its Final Report on Foreign and Military Intelligence, the Senate Select Committee to Study Government Operations With Respect to Intelligence Activities (1976) ("Church Committee") concluded that:

> The Agency's statutory authority to spend money for proprietary corporations in support of Agency operations is derived from

Section 8(b) of the CIA Act of 1949. (at 234)

At the same time, however, the CIA has been given great latitude in the creation and acquisition of proprietary companies that would not normally be granted to other agencies.

For example, OPM argued before the Merit Systems Protection Board and the appeals court below that proprietaries were not government corporations because they were not included within the list of corporations contained in the Government Corporation Control Act, 31 U.S.C. 9101 et seq., and therefore, their employees are not entitled to those benefits typically available to other federal employees.

With regard (at 234) to the specific requirements of the 1949 act, the "Church Committee" noted:

> The language in Section 8(b) is adequate authority to exclude the operation of these proprietary corporations from the law governing Government corporations in 31 U.S.C. 841 et seq. However, the CIA General Counsel ruled in 1958 that the CIA should comply with the principles in that act to the extent possible, and this has been done. (at 234) (emphasis added)

Clearly, it was the intent of Congress to exclude acquisition of commercial proprietaries from the restrictions imposed by the Government Corporation Control Act. At page 235 of its Report the "Church Committee" concluded:

> "The Government Corporations Control Act clearly did not contemplate Government corporations of the type that the CIA has established. Furthermore, it is not feasible for Agency proprietaries to be created by act of Congress or overseen precisely as provided for normal Government corporations in the Act..." (emphasis added.)

Moreover, the court below failed to consider the impact that public

disclosure of proprietaries would have upon the activities of the CIA. Had the CIA made its relationship with the proprietaries public, it would have defeated the entire purpose of having proprietaries in the first place, which according to the "Church Committee" Report was to:

1. Provide cover for intelligence collection and to support clandestine action projects;
2. extend the CIA's influence and information network in the overseas business community;
3. provide support services for covert operations;
4. operation of propaganda mechanisms; and
5. management of private investments.(at 206)

Contrary to arguments raised by OPM, in the final analysis, the definition of a government corporation is, for purposes of determining retire-

ment benefits, deceptively simple. 5 U.S.C. 103 states:

> For the purpose of this title -
>
> (1) 'Government corporation' means a corporation owned or controlled by the Government of the United States...

This clear, simple definition states (without exception) that a corporation owned by the federal government is a government corporation for purposes of Title 5, United States Code, which governs Petitioner's claim to retirement benefits.

B. EMPLOYEES OF GOVERNMENT CORPORATIONS ARE FEDERAL EMPLOYEES

Likewise, the definition of "employee" is considerably broader than 5 U.S.C. 2105(a) and the decisions of the Federal Circuit would seem to suggest at first glance. For example, consider the 1970 Edition of the United

States Code, where, at page 347, a Historical and Revision Note for 5 U.S.C. 5551-2 is as follows:

> The words "An employee as defined by section 2105 of this title" are co-extensive with and substituted for "Employees of the United States Government ...(including employees of any corporation created under authority of an Act of Congress which is either wholly controlled or wholly owned by the United States Government, or any corporation, all the stock of which is owned or controlled by the United States government, or any department, agency, or establishment thereof, whether or not the employees thereof are paid from funds appropriated by Congress. (emphasis added)

Additionally, prior to codification of the civil service laws into Title 5, United States Code, in 1966, then existing law unquestionably granted retirement credit to employees of government corporations.

In 1956 Congress enacted the Federal Executive Pay Act, 70 Stat.

743, as a complete revision of the then controlling Civil Service Retirement Act of May 29, 1930. See 1956 U.S. Code Cong. and Ad. News 3741. The 1956 Act, as embodied in Section 2251 of former Chapter 30 of Title 5 (prior to the 1966 codification) stated, in pertinent part, as follows:

> (a) The term "employees" shall mean a civilian officer or employee in or under the Government and... shall mean any person to whom this chapter applies. ...
>
> (k) The term "Government" shall mean the executive, judicial, and legislative branches of the United States Government, including Government-owned or controlled corporations... (emphasis added)

Petitioner was employed by a series of three government-owned or controlled corporations. He would have thus, by virtue of Section 2251 above, logically

been included within the definition of "employee" contained in the pre-codification law.

More importantly, however, is that fact that the subsequent codification of Title 5 in 1966 took into account prior this statutory authority and incorporated, without change, the definitions contained in Section 2251 into the current definition of "employee," now found at 5 U.S.C. 2105. Specifically, Congress intended by its 1966 codification to make up no substantive change to existing law when it stated:

> The legislative purpose in enacting sections 1-6 of this Act [the new codification] is to restate, without substantive change, the laws replaced by those sections on the effective date of this Act [Sept. 6, 1966... Pub. L. 89-554, Section 7(a), 80 Stat. 631, Sept. 6, 1966]. (emphasis added)

Since Congress admittedly took into account the prior statutory authority, including the 1956 act when it codified Title 5 United States Code, it must have been aware of and ratified the prior definition of "employee" which included employees of government corporations by definition. Therefore, the present definition of "employee," embodied in 5 U.S.C. 2105(a), must, by statutory construction, incorporate within it the terms of the prior existing definition. Logic thus dictates that Petitioner is a federal employee for retirement services during his tenure with the CIA proprietaries.

C. PETITIONER HAS MET THE REQUIREMENTS OF 5 U.S.C. 2105 AND IS A FEDERAL EMPLOYEE

5 U.S.C. 2105(a) sets out the criteria currently required to establish

that Petitioner was a federal employee, namely (1) that he was appointed by a variety of individuals, including, but not limited to "the head of a government controlled corporation" or "an individual who is an employee under this section", (2) that he was supervised by a federal officer and (3) that he was performing a federal function.1/ The critical issue before the Court is whether Petitioner was "appointed into the federal service."

Traditionally, the Federal Circuit has taken an overly formalistic approach to the "appointment" requirement. See Baker v. United States, 614 F.2d 263 (Ct.Cl. 1980); Costner v. United States, 665 F.2d 1016 (Ct.Cl. 1981).

1/ This section does not prescribe the manner in which an appointment is effectuated.

Petitioner believes, that the Court should interpret this requirement pragmatically, as the CSC had historically done in the past.2/ A proper analysis of Petitioner's situation mandates an attempt to isolate the appointment itself from the evidence of the appointment.3/

Marbury v. Madison, 5 U.S. (Cranch) 37 (1803), clearly the seminal decision on this issue, is illustrative.

2/ In rulings varying from the Smithsonian Institution to the Farm Credit Administration CSC has infromally interpreted this requirement to mean that a person must be "appointed or employed" by a Federal officer, thus suggesting that CSC analyzed an application for retirement benefits both under a formal (appointment) and informal (employment) standard.

3/ The use of a particular document is not required in order to find that an appointment had been effectuated. National Treasury Employees Union v. Reagan, 663 F.2d 239 (D.C. Cir., 1981); Beacom v. Equal Employment Opportunity

Commission (EEOC) 500 F.Supp. 428 (D. AZ 1980). In Marbury, the Court held that an appointment will be recognized when the last act required by law has been carried out by the person with authority to vest the appointment. Further, the failure to sign a commission was insufficient to find a lack of appointment because the commission merely evidenced an act of appointment previously made by the President when he exercised his discretion. While stressing the need for formalities, the Court in Marbury clearly recognized the difference between the appointment and its evidence.

Since Marbury, the lower courts, and particularly the Federal Circuit, have repeatedly focused solely upon the evidence (or lack thereof) of an

appointment rather than the existence of the appointment itself. Horner v. Acosta, 803 F.2d 687 (Fed.Cir., 1986) Baker, supra; Costner, supra.

It is Petitioner's contention that he was employed by a government corporation and the decision by CIA to reaffirm his employment with the air proprietaries, was, for all intents and purposes, an "appointment" despite the lack of the usual formalities. As stated above, Petitioner contends that certain formalities, such as new employment and secrecy agreements were utilized.

The lower courts have generally rejected the notion often advanced by OPM that a particular type of document, such as an SF50 is required to evidence an appointment. National Treasury

Employees Union v. Reagan, 633 F.2d 239 (D.C.Cir., 1981); Horner, Supra. Government corporations appoint their personnel, through corporate policies and procedures, in such a manner as they see fit and employees of such corporations are federal civil service employees (under 5 USC 2105 or predecessor statute) even though they are not appointed in the same procedural manner as those federal employees whose appointments are governed by OPM.

Oddly enough, the court below suggests, Appendix A, page 7, that Petitioner is not entitled to the benefits of appointment status because he was unaware at the time of the fact that his ultimate employer was the United States government. Not only is this an unsubstantiated theory, but there is at least one instance where the

Attorney General of the United States has ruled otherwise. At 37 Op. Att. 7 it is noted:

> ... the failure of an appointing officer to take proper action should not be permitted to annul the status to which an employee, perhaps without his knowledge, was entitled to at any given moment. (emphasis added)

During the course of the administrative proceeding before the MSPB, OPM responded to interrogatories on the subject of appointment procedures for for government corporations in the following manner:

> "4. State whether OPM has knowledge of how Government corporations appoint or employ their employees. State whether this is accomplished through use of any required form or specific procedures, and if so, identify such forms and procedures.
>
> Response: OPM objects to this interrogatory as burdensome, overboard and

irrelevant. Government corporations, as any other federal agency, use a variety of appointment documents and procedures. It is not possible, nor is it relevant, to describe all types of appointment procedures and forms.

5. State whether OPM has any regulations governing appointments in Government corporations, and if so, identify such regulations.

Response: OPM has no regulations governing appointments in Government corporations" (emphasis added)

Petitioner was, during the course of his employment with the air proprietaries, an employee of a government corporation (wholly owned or controlled by the CIA) and he was appointed under normal and proper corporate procedures. He is therefore entitled to benefits under the civil service retirement system.

II. ALTERNATIVELY, RETIREMENT CREDIT IS ALLOWABLE FOR PERSONAL CONTRACT SERVICES

The court below, Appendix A, page 7, concluded that government employees must be appointed and "excludes one whose services are retained merely by contract". Unquestionably, appointment is the normal way of filling a civil service position. It is not, however, the only way.

Petitioner, in the alternative, is entitled to retirement credit for contract services with a government corporation, based on internal guidance provided in the Federal Personnel Manual (FPM Supplement 831-1, Sub-Chapter S3-3 (c)) and in the Code of Federal Regulations (5 C.F.R. 831.201). These authorities make it clear that OPM has

historically viewed contract service as creditable.4/

FPM Supplement 831-1, Sub chapter S3-3(c) provides a five-part test to determine whether contract service may be credited for retirement purposes. These five tests are:

1. The contract must contemplate full (or specified amounts of part) time service;

2.a. The person under contract must receive daily supervision from a federal official ; or

2.b. The periods of actual service made of record are computable;

3. The contract must not call for a single or special transaction;

4/ Petitioner notes, however, that OPM changed its FPM guidance following the administrative decision in Horner v. Acosta, supra.

4. The contract must not call for the production of a particular item, such as a report or plan; and

5. The services provided must only be terminable by the federal government. A review of the record in this matter shows that Petitioner easily met all five of these criteria.

The Code of Federal Regulations likewise supports the proposition that Petitioner is entitled to service credit. Section 831.201 of Title 5 of the Code of Federal Regulations (5 C.F.R. 831.201) delineates those groups of employees for which retirement coverage is allowed, including:

> Employees who are citizens of the United States who are appointed by contract between employees and the Federal employing authority

> which require their personal services and are paid on the basis of units of time. (emphasis added)

Petitioner again has met all of these requirements.

Petitioner does not contend that these regulations obviate the need for an appointment, but rather that evidence of an appointment satisfying the third criteria of 5 U.S.C. 2105(a) can be found in a properly created contractual relationship. The statute only requires an appointment, it is silent on how an appointment is effectuated.

Given this, Petitioner would appear to be entitled to retirement credit. However, OPM, both in the instant case and in Horner, supra, argued before the appeals court that their interpretation, as embodied in the FPM and the CFR for over twenty years, should be ignored

since its interpretation ran contra to the statutory language contained in 5 U.S.C. 2105(a). Oddly enough, although in error, the Federal Circuit adopted the faulty logic expressed by OPM, Appendix A, page 18, when it held:

> "Appointment is the normal way of filling a civil service position, and it is distinguished from employment by contract...An employment contract is not necessarily inconsistent with an appointment. We do not wish to be understood as holding that the government may not employ a person under both forms simultaneously. The point is that the occurrence of either one does not necessarily imply the other.

The error in the lower court's logic is their acceptance of the notion that the existence of one hiring vehicle (contract or appointment) may not, under any circumstances, automatically give rise to the other. In other words, the Federal Circuit believes that employment

by contract and by appointment are mutually exclusive. To the contrary, Petitioner believes that this conclusion was ruled out by OPM in its regulations, 5/ namely that one can be "appointed by contract," and OPM should be bound by their own regulations.

Clearly the court below erred by not so binding OPM to its own duly promulgated regulation. 6/ "An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress"

5/ In fact, 5 CFR 831.201 uses the phrase "appointed by contract."

6/ In addition, it should be noted that the CIA has traditionally recognized that its officers are often appointed "by means of a contract". See Glerum Affidavit.

7/ United States v. Riverside Bay View Homes, 474 U.S. ____, 88 L.Ed.2d 419 (1985). See National Labor Relations Board v. Hendrick's County Rural Electric Membership Corporation, 454 U.S. 170, 70 L.Ed. 2d 323 (1981). "Moreover, and agency's construction need not be the only reasonable one to gain judicial approval." Connecticut Department of Income Maintenance v. Heckler, 105 S.Ct. 2210, 85 L.Ed. 2d 577 (1985).

In Udall v. Tallman, 380 U.S. 1, 13 L.Ed.2d 616 (1965) the Supreme Court noted, in this regard that:

> When faced with a problem of statutory construction, this Court shows great deference to the

7/ If anything, Congress, in the Church Committee Report and in the 1966 codification of Title 5, adopted the concept of employment of federal employees by non-typical methods in appropriate circumstances.

> interpretation given the statute by the officers or agency charged with its administration... Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting the machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and true.' When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order. (at 16) (Emphasis added)

Further, in Zemel v. Rusk, 381 US 1, 14 L.Ed.2d 179 (1965), the Court announced that, as a minimum, the party seeking to uphold the administrative interpretation of a statute must be able to show that Congress had knowledge of the interpretation and failed or refused to revise or repeal the statute. Four years later, the Court noted, in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381, 23 L.Ed. 2d 321 (1969) that:

> By the equally venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction. Here, the Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it...

See also CBS, Inc. v. FCC, 453 U.S. 367, 69 L.Ed.2d 706 (1981) (where Court refused to overturn administrative interpretation when subject of considerable Congressional controversy)

To state that America's intelligence network and its practices and organizations had received a great deal of public and Congressional scrutiny is an understatement. Such was the outcry over the abuses of our intelligence community, civilian and military, domestic and foreign, that Congress conducted a wide-ranging study

of the entire issue, resulting in the 1976 "Church Committee" Report, supra. One of the recommendations made in the Report, at 352, was that Defense Intelligence Agency employees should be excepted from civil service laws to improve performance, the point being that Congress was acutely aware of the unique personnel practices related to the intelligence community. In fact they supported the greater use of employees where civil service documentation could be avoided, rather than less.

Clearly, OPM should be obliged to abide by its own regulations, promulgated with care and in force for nearly twenty years until a litigant sought to enforce these regulations

against the agency.8/

Given this, the recognition of Petitioner's status as a federal employee requires a two step analysis. First, it must be found that Petitioner was appointed by way of a contract as an employee of a government corporation through their normal corporate hiring practices. Following this, it requires a finding that once Petitioner is held be have been an employee of a government corporation, he is a federal employee entitled to the benefits flowing from that status.

8/ Traditionally, courts have placed just such reliance upon the FPM. In NTEU v. Reagan, supra, the D.C. Circuit noted that "The Manual is the 'official' medium of the Commission [sic] for issuing its personnel regulations and instructions, policy statements and related material of Government-wide personnel programs, to other agencies. Ch. 171, Subch. 2-1 (January 31, 1972)."

Unquestionably, Petitioner was not appointed into the civil service in the typical way. The covert nature of the proprietaries dictated otherwise. Nonetheless, the failure of the court below to recognize the two step analysis above has done Petitioner a grave injustice which must be corrected by focusing upon substance--rather than form.

III. THE COURT BELOW TAINTED THE DECISION AND ERRED BY SPECULATING AS TO THE POLITICAL AND SOCIAL RAMIFICATIONS OF A DECISION FAVORING PETITIONER WITHOUT SUPPORT IN THE RECORD.

Lastly, the Court is called upon to decide the question of whether the appeals court overstepped its bounds by concluding that a decision in favor of Petitioner would have potentially untoward effects upon the ultimate soundness of the civil service retirement service, when the administrative record contained no evidence to support such a conclusion.

Specifically, the court held, Appendix A, page 5, that:

> The importance of this case is its extraordinary implications for the civil service. The position urged by Watts would create a new category of employees, who, without formal appointment or even awareness of the government's role when employed, would become "appointed" civil servants, in numbers unknown and without thought

as to their effect on actuarial soundness of the retirement fund.

If nothing else, this preliminary analysis of the social and political implications of a decision favoring Petitioner, without adequate justification in the record to support it, so tainted the decision making process so as to make a rejection of Petitioner's appeal unavoidable.

Further, it is entirely unclear as to whether a reversal favoring Petitioner would create a new class of federal employees at all or rather, whether it would merely enforce more clearly longstanding administrative interpretations as to what constitutes federal employment.

More importantly, however, it is undeniable that such speculation, without facts to support it, is better

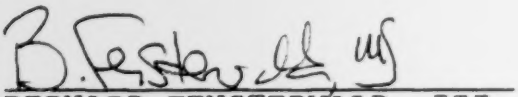
left for the legislature to contemplate, not the judiciary. It is not the purview of the courts to speculate or to decide the hypothetical. Duhart v. Carlson, 469 F.2d 471 (10th Cir., 1972). Courts must decide issues based on facts and may only base their decision upon facts actually before them. Impossible Electronic Techniques, Inc. v. Wackenhut Protective Services Inc., 669 F.2d 146 (5th Cir., 1971) DeVille v. Shell Oil Co. 366 F.2d 123 (9th Cir., 1966); Local P-171 v. Thompson Farms Co., 642 F.2d 1065 (7th Cir., 1981). Ghandi v. Police Department of the City of Detroit, 747 F.2d 338 (6th Cir., 1984). There are no facts contained in the record which relate to the actuarial or demographic ramifications of a favorable decision for Petitioner--either positive or negative. In fact, Petitioner

attempted to elicit such data from OPM during the administrative hearing. For the appeals court to hold otherwise was clear error.

CONCLUSION

Based upon the arguments and facts presented should be credited for purposes of determining civil service retirement benefits and he prays that a Writ of Certiorari be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Barbara E. Grove, hereby certify that on this 29th day of June, 1987, I filed with the Clerk's Office of the Supreme Court of the United States the foregoing Petition for a Writ of Certiorari and further certify that I mailed this same date the required copies to the opposing counsel listed below:

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Appendix A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ROY F. WATTS, Petitioner,	)	
v.	)	Appeal No.: 85-2435
OFFICE OF PERSONNEL MANAGEMENT, Respondent.	)	

DECIDED: April 1, 1987

Before DAVIS, Circuit Judge, NICHOLS, Senior Circuit Judge, and ARCHER, Circuit Judge.

NICHOLS, Senior Circuit Judge.

Roy F. Watts appeals the decision of the Merit Systems Protection Board (MSPB or board) Docket No. DC08318110229 affirming the conclusion of the Office of Personnel Management (OPM) that Watts is not entitled to civil service

retirement benefits pursuant to 5 U.S.C. 8332 for his employment with proprietary corporations of the Central Intelligence Agency (CIA). We affirm.

Background

Watts was employed as a pilot between April 12, 1947, and April 28, 1967, by various CIA "proprietary" corporations, defined as entities owned by the CIA while operating ostensibly as ordinary commercial enterprises. The first position Watts held was with the China National Relief and Rehabilitation Administration (CNRRA) Air Transport. CNRRA, originally Chennault Air Transport, was a private partnership created at the end of World War II to fly relief supplies throughout postwar China and to assist the anti-communist effort in China. The CIA used the services of CNRRA, later the Civil Air

Transport (CAT), on a contract basis from 1947 until 1950. In 1950 the CIA purchased the company. In 1959 CAT was renamed Air America, Inc.

Watts was employed by Air America and its predecessor companies from April 12, 1947, to July 10, 1961. At the time Watts signed an employment contract with the first company, CNRRA, it was privately owned and not a CIA proprietary. Watts' original contract was with CNRRA only, and he did not execute any agreement with the CIA. The terms of Watts' original contract with CNRRA were assumed by each successor to CNRRA and the contract was not altered after the CIA purchased CAT, as then named. Watts has stated that he perceived no change, formal or informal, in the nature of his duties after the

CIA acquired CAT. The duties assigned Watts were a mix or ordinary and covert operations.

Watts was later employed between October 1, 1962, and December 17, 1966, for Intermountain Aviation, Inc. (Intermountain), another CIA proprietary. When first hired by Intermountain, Watts was not aware of its connection with the CIA, although sometime after he was hired he learned that Intermountain was also a CIA proprietary. In 1966, Watts, about to leave Intermountain, was offered a GS-13 career appointment as a federal employee. He declined the offer and resigned from Intermountain in December 1966. Watts makes no claim to retirement benefits beyond December 1966. In January 1974, Watts petitioned the CIA for recognition of his work and

claimed retirement benefits, beginning the various proceedings leading to the current appeal to this court. A United States District Judge held he should have a "full and fair hearing" before the "appropriate arm of the CSC" (Civil Service Commission), to which the MSPB succeeded.

The Administrative Law Judge (ALJ) of the MSPB disregarded all asserted facts but those which were undisputed. He considered summary judgment was permissible because the case arose before the Civil Service Reform Act of 1978, Pub. L. No. 95-454, which seems to disallow this useful device in adjudication of employee appeals. He cited 5 C.F.R. 772.31 (1978). He granted OPM's motion for summary judgment on the grounds that Watts was not "appointed in

the civil service" as required by 5 U.S.C. 2105, which sets out the current statutory definition of an employee eligible for civil service retirement benefits. The ALJ, in reaching this conclusion, considered Watts' testimony and concluded that it is "abundantly clear" that Watts never considered himself a federal employee and neither was he considered an employee by the CIA. There was no intent on either side, according to the ALJ, to effectuate an appointment to the civil service. The full board, by order on January 11, 1985, declined to review this initial decision and therefore adopted the decision. Watts' appeal to this court followed, delayed by a stay by this court pending the outcome of the court's decision in Horner v. Acosta, 803 F.2d 687 (Fed. Cir. 1986).

Analysis

I

The legal issue on appeal is whether an employee of a CIA proprietary is "appointed in the civil service" and, therefore, entitled to civil service retirement benefits solely on the basis of the CIA's ownership of the corporation. As is explained below, Section III, the requirement that the "employee" be "appointed" excludes one whose services are retained merely by contract.

The value of Watts' work is not denied or questioned, but Congress clearly did not intend to award retirement benefits to all persons who might be thought to deserve them. It can, itself, add to the entitlements it has created when it deems it right to do so. The importance of this case is its

extraordinary implications for the civil service. The position urged by Watts would create a new category of employees who, without formal appointment or even awareness of the government's role when employed would become "appointed" civil servants, in numbers unknown, and without thought as to their effect on actuarial soundness of the retirement fund. The implications of Watts' position might extend further to cover employees of corporations, privately owned, yet primarily producing goods or services for the government. We conclude that, in the absence of formal or even intended appointment, Watts is not an "employee" for the purposes of the civil service system.

The provisions of 5 U.S.C. 8332 establish that service as an "employee"

is creditable for civil service purposes. The term "employee" by cross reference is defined in 5 U.S.C. 2105(a) as follows:

> (a) For the purpose of this title, "employee", except as otherwise provided by this section or when specifically modified, means an officer and an individual who is--
>
> (1) appointed in the civil service by one of the following acting in an official capacity--
>
> * * * * *
>
> (2) engaged in the performance of a Federal function under authority of law or an Executive act; and
>
> (3) subject to the supervision of an individual named in paragraph (1) of this subsection while engaged in the performance of the duties of his position.

5 U.S.C. 2105(a)

In Acosta, this court concluded that an individual must satisfy all three elements of section 2105(a) to be

considered a federal employee and that the requirements for these elements are strictly construed. Acosta, 803 F.2d at 691-92.

The question of the nature of "appointment" was at the heart of the case in Acosta as it is here. The board had held that the contract executed between the Navy and the employees was sufficient to establish "appointment." Judge Archer writing for the court rejected this argument and noted that:

> The established rule is that one is not entitled to the benefit of a [government] position until he has been duly appointed to it. *** The precedents binding on this court have required that there be a significant degree of formality in the appointment process.

Acosta, 803 F.2d at 692.

These principles were derived in part from Baker v. United States, 614 F.2d

263, 268 (Ct.Cl. 1980) (concluding that "an individual cannot hold a government position *** nor receive the salary and other benefits pertaining thereto, until he or she has been appointed to that position by a person authorized to make that appointment") and Costner v. United States, 665 F.2d 1016, 1020 (Ct.Cl. 1981) ("[a]n abundance of federal function and supervision will not make up for lack of an appointment").

In concluding that the respondent employees were not "appointed" in the civil service, Judge Archer examined the indicia of appointment such as whether the employees were paid through the civil service system, given an oath of office, or asked to sign an SF 50 or 52. Acosta, 803 F.2d at 694. As noted in a footnote, another indication of civil service status was that one was not

subject to Social Security withholding. The court concluded, in the absence of these indicia or a clear and unequivocal document of appointment, that there was no appointment to the civil service within the meaning of 5 U.S.C. 2105(a). Id.

Although the parties in Acosta stipulated that each of the respondents was engaged in the performance of a federal function and was supervised by a federal official, thereby eliminating two of the section 2105(a) tests from the court's scrutiny, we read Acosta to mean that the question of appointment, by itself, controls the question of whether an individual is an "employee" for the purpose of civil service retirement. Accord Baker, 614 F.2d at 266.

II

We now address, in light of the opinion in Acosta, the question of whether Watts was "appointed" to the civil service by virtue of his employment with a CIA proprietary. As a preliminary matter, we note that Watts' argument that different standards apply to pre-title 5 claims for retirement was directly rejected in Costner. In that case, the court found that:

> Section 2105(a) was first enacted in 1966 in the wholesale revision of title 5. ***The legislative history is quite clear, however, that its provisions represented existing law and made no changes in the substantive requirements imposed on the plaintiff [to establish that he is an "employee"]. *** The commission [Civil Service Commission] has used precisely these same criteria since 1944. (citations omitted)

Costner, 665 F.2d at 1019 n.14.

In regard to the issue of appointment, Watts, citing the holding

in Mabury v. Madison, 5 U.S. (1 Cranch) 137 (1803), argues that formalities of appointment are only evidence of appointment and do not control whether there actually was an appointment. In effect, Watts argues that the circumstances as a whole indicate the intention to appoint Watts to the civil service. The court in Acosta distinguished Marbury and rejected precisely this argument, noting that Marbury involved a failure to deliver a commission, not a requirement of appointment. Acosta, 803 F.2d at 693. The formalities of the appointment were observed in Marbury. Id. In Costner the former Court of Claims also rejected the "totality of the circumstances" test suggested by Watts for determining whether there is "appointment."

Costner, 665 F.2d at 1020.

Watts offers no other basis for finding "appointment" to the civil service. The undisputed facts of this case indicate that Watts never executed an SF 50 or 52 or any other standard form or document creating a nexus between him and the government, was never given an oath of office, and was not aware of the CIA's involvement until after his employment contract was executed. Acceptance is important, as membership in the civil service imports burdens as well as benefits. The cases mentioning standard forms and oaths of office do not necessarily exclude other rituals that may be devised to signalize an appointment from time to time. The essential prerequisites are an authorized appointing officer who takes an action that reveals his awareness he

is making an appointment in the United States civil service, and action by the appointee denoting acceptance. The evidence that the CIA at one point offered Watts a "career position" in the federal service in 1966, and he refused, implies that both he and the CIA correctly did not consider that he was already in the civil service. It is clear the CIA knew how to create positions whose incumbents were "employees" within the statutory definition.

We do not accept the proposition suggested by Watts that an individual can become a federal employee in a passive manner without appointment, or with appointment only to the service of a private carrier, and even without an awareness at the beginning of the

contractual relationship, of the involvement of the government. The status of "employee" requires an unequivocal intention to bring an individual within the civil service. Acosta, 803 F.2d at 692-94. Employees of government proprietaries, without appointment, are not such "employees." The case of the overt government corporation, such as the former Reconstruction Finance Corporation, differs for many reasons and our holding does not apply to it. We hold that the board's finding that Watts was never "appointed" in the civil service is supported by all the facts.

III

As an alternative to relief under the provisions of section 2105, Watts argues that he is entitled to civil service credit for "contract services"

pursuant to the provisions of the Federal Personnel Manual Supplement. FPM Supp. 831-1, Subch. S3-3(c) (March 29, 1985). Watts also suggests relief is available under 5 C.F.R. 831.201 as well as other "informal" internal guidance. In Acosta, this court reversed the board on this point: [Congress] *** defined employee for purposes of the CSRA in a manner which is inconsistent with the FPM language on contract service. Thus *** it [FPM Supplement] has been made obsolete by the enactment of the statutory definition of employee. And the broad decision of the Board that appointment is not a required element of respondents' case cannot withstand the express appointment requirement of the statutory definition. Acosta, 803 F.2d

at 695. Appointment is the normal way of filling a civil service position, and it is distinguished from employment by contract. United States v. Hopkins, 427 U.S. 123 (1976). In that case, consent to suit on contracts of nonappropriated fund agencies in 28 U.S.C. 1491 is held to exclude appointed employees' pay claims. An employment contract is not necessarily inconsistent with an appointment. We do not wish to be understood as holding that the government may not employ a person under both forms simultaneously. The point is that the occurrence of either one does not necessarily imply the other.

IV

Watts asserts procedural due process error in this case and claims he was not allowed adequate discovery. We conclude that neither grounds provide

reversible error. Watts has failed to assert what he might have learned from additional discovery, and it is precisely his own assertations of the facts as to his employment that refute his claim that he was an "employee" during his service with CIA proprietaries. Without support provided for the relevance of additional discovery, we find there was no abuse of discretion in denying such discovery.

Watts' due process issue concerns the board's decision that an evidentiary hearing in this case was not necessary and not required by statute. Watts concedes that he is not entitled to a hearing under the "old rules" applicable to his case. Based on our review of 5 C.F.R. 1201.191-(b) concerning pending proceedings and the then applicable 5

C.F.R. 772.311(a) (1978) concerning appeals to the CSC, we agree that a hearing, prior to the enactment of the Civil Service Reform Act, was discretionary. Watts suggests, however, that the board abused its discretion in failing to provide a hearing. We hold, from a review of the record, that the board did not abuse its discretion by denying Watts' request for a hearing which, in view of absence of dispute as to the facts, really meant an opportunity for oral argument as to the law. The board relied on adequate and extensive written testimony provided by Watts and other appellants joined in the appeal to the board as well as on documents and records provided by the appellants.

Watts additional contention that the record was insufficient to reach a

conclusion using standards parallel to summary judgment is also without merit. The OPM properly considered the available facts in light least favorable to the government and reached a "summary judgment," upheld by the board, based on evidence primarily presented by Watts and other appellants. This conclusion that "summary judgment" was appropriate is tied as well to the conclusion that an oral hearing was discretionary and, in this case, not necessary.

Conclusion

The board's conclusion that Watts was not "appointed" to the civil service as per 5 U.S.C. 2105(a) or entitled to civil service benefits under other pre-CSRA standards is consistent with all the facts and correct as a matter of law.

AFFIRMED

Appendix B

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

JERRY FINK DAVID H. HICKLER ROY WATTS	)	Docket Number DC08318110385
v.	)	DC08318110731 DC08318110229
OFFICE OF PERSONNEL MANAGEMENT	)	Jan. 11, 1985

ORDER

The Board has fully considered the appellant's request to reopen and reconsider the decision of the Administrative Law Judge issued on March 10, 1983. The regulations governing the adjudication of appellants' cases, 5 C.F.R. 772.310 and 772.312 (1978), set forth the regulatory criteria for reopening the previous decision of an Appeals Officer. Under those regulations the party requesting reopening and reconsideration must

submit written evidence or argument which tends to meet one or more of the regulatory criteria.

The Board finds that appellants' request does not meet any of the above regulatory criteria and therefore the request to reopen the decision is DENIED, and that decision remains the final decision in these matters. */

There is no further right of administrative appeal from a decision of the Merit Systems Protection Board on a request for reopening. These cases are

*/ See Acosta v. Office of Personnel Management, MSPB Docket No. DC08318010060 (January 30, 1984) (service credit for retirement purposes may be awarded for service under a personal services contract under certain circumstances); Berard v. Office of Personnel Management, MSPB Docket No. DC08318210739 (April 9, 1984) (appellant not eligible for retirement coverage where he fails to show that he was appointed by an authorized Federal official to a position in the civil service).

considered to be closed by the Board since all administrative appeal rights have been exhausted. Any further remedy concerning these cases lies in the federal court system.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D. C.